

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD EMMITT BRIGGS,

Defendant-Appellant.

UNPUBLISHED

January 19, 1999

No. 200703

St. Clair Circuit Court

LC No. 96-000059 FH

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of arson of a dwelling house, MCL 750.72; MSA 28.267. The trial court sentenced him to ten to twenty years' imprisonment. We affirm.

I

Defendant first argues that the prosecutor's introduction of evidence relating to gang-initiation procedures requires reversal because the evidence was irrelevant, inflammatory, and prejudicial. However, because defendant did not object to the admission of this evidence below, our review of this issue is only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

In light of the overwhelming evidence of guilt, any impropriety in the admission of the evidence regarding gang-initiation procedures did not result in manifest injustice. Defendant both had access to gasoline and smelled distinctly of gasoline on the day after the fire. The footprints in the snow behind the burned house were consistent with the tread design on defendant's shoes. The police tracked the footprints to the residence where defendant had spent the night. Two witnesses testified that defendant had bragged to them that he had set fire to a house using gas and a lighter and guided them to view the damage. On this record, we find no error requiring reversal. See *id.*; *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

II

Next, defendant argues that he was denied a fair trial because in closing argument the prosecutor argued a theory of motive that was not supported by any facts in evidence. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant objects to the prosecutor's argument that defendant committed the arson as part of a gang initiation because no evidence was presented that defendant wanted to become a member of the Locs gang. While defendant is correct that the prosecutor did not establish that defendant had any interest in formally joining the gang, we conclude that a curative instruction could have cured any prejudice resulting from the prosecutor's closing argument. Moreover, declining further review of this unpreserved issue will not result in a miscarriage of justice. Given the strong evidence against defendant and the trial court's instruction that the lawyers' statements were not evidence, we hold that defendant was not denied a fair trial. Cf. *People v Bigelow*, 225 Mich App 806, 810; 571 NW2d 520 (1997).

III

Next, defendant argues that the prosecutor improperly vouched for defendant's guilt by introducing the testimony of a police officer who mentioned that his office had "identified the suspect." Because defendant did not object at trial, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Nantelle, supra*.

The prosecutor may not use the prestige of his office to vouch for a defendant's guilt. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). However, when the prosecutor's comments are reviewed in context, it is clear that she was simply attempting to obtain the officer's in-court identification of defendant and to provide background for the actions taken by the officer. Furthermore, review of this issue is precluded because any prejudice resulting from the prosecutor's phrasing of the question could have been eliminated by a curative instruction and there is no indication that failure to consider the issue would result in a miscarriage of justice. See *Nantelle, supra*.

IV

Finally, defendant argues that the trial court abused its discretion in sentencing defendant to ten to twenty years in prison, when the sentencing guidelines produced a recommended minimum range of six to thirty-six months. Defendant maintains that the trial court's proffered reasons for exceeding the guidelines were inadequate. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435

Mich 630, 636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

The trial court provided the following reasons for exceeding the sentencing guidelines: (1) the “terror imposed on the three residents of the home during the middle of the night;” (2) defendant’s “thoughtless disregard for the lives of the people in the home;” and (3) the fact that the crime was gang-related.

Defendant first argues that the trial court erred in basing its departure from the sentencing guidelines range on factors that were already considered in the guidelines. However, a sentencing court may base a sentence more lengthy than that suggested by the sentencing guidelines on factors accounted for in the sentencing guidelines. *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). Where a defendant’s actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted. *Id.*

In addition, defendant contends that the trial court’s reasons for departure are inadequate. Defendant notes that aggravating factors, such as the threat to human life and terror imposed on the victims, are already considered under Offense Variable (OV) 18. However, contrary to defendant’s argument, the terror imposed on the victims was not already considered under OV 18.¹ Moreover, in the present case, defendant’s actions endangered the lives of four people, a fact not accounted for under OV 18.

Defendant also maintains that the trial court’s finding that the crime was part of a gang initiation is without support in the record. However, although no evidence was presented that the arson was part of a formal gang initiation, there was testimony suggesting that the arson was part of a gang retaliation. Therefore, it was not, as defendant argues, improper for the court to use gang-relatedness as a reason for departure.

Finally, defendant argues that, even if a departure from the guidelines were appropriate, the extent of the departure in his case was nonetheless inappropriate. After carefully reviewing the record, we disagree. The Supreme Court has stated that “[n]either the grids nor *Milbourn* dictate that a departure from guidelines is to be arithmetically measured to determine the propriety of a given sentence.” *People v Merriweather*, 447 Mich 799, 808; 527 NW2d 460 (1994). In the instant case, defendant set fire to a home at 2:00 a.m., a time when the fire could well have gone undetected until it was too late to save the lives of the four occupants. The trial court’s characterization of defendant’s deed as a “vicious, mean, hateful act” is accurate. Under the circumstances of this case, defendant’s sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn*, *supra*. Accordingly, we conclude that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

¹ In contrast, OV 2 in the burglary crime group specifically provides for additional points to be scored when the victims are subjected to terrorism.